UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DURRELL PUCKETT, Plaintiff, v. LT. J. BARRIOS, C.O. WHITE, SGT. HERNANDEZ, C.O. GUTIERREZ, Defendants.	Case No. 1:23-cv-00054-HBK (PC) SCREENING ORDER FINDING PLAINTIFF STATES EIGHTH AMENDMENT CONDITIONS OF CONFINEMENT CLAIM AGAINST DEFENDANTS[1] (Doc. No. 12) ORDER DENYING PLAINTIFF'S MOTION TO APPOINT COUNSEL (Doc. No. 14)

Pending before the Court for screening under 28 U.S.C. § 1915A is the pro se First Amended Complaint filed under 42 U.S.C. § 1983 by Durrell Puckett—a prisoner. (Doc. No. 12). For the reasons set forth below, the Court finds the First Amended Complaint states a cognizable claim and will direct service of process by separate order. Also pending is Plaintiff's Motion to Appoint Counsel. (Doc. No. 14). For the reasons set forth below, Plaintiff's Motion to Appoint Counsel is denied.

SCREENING REQUIREMENT

Plaintiff commenced this action while in prison and is subject to the Prison Litigation

[1] This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

Reform Act ("PLRA"), which requires, *inter alia*, that the court screen any complaint that seeks relief against a governmental entity, its officers, or its employees before directing service upon any defendant. 28 U.S.C. § 1915A. This requires the Court to identify any cognizable claims and dismiss the complaint, or any portion, which is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §§ 1915A(b)(1), (2).

At the screening stage, the Court accepts the factual allegations in the complaint as true, construes the complaint liberally, and resolves all doubts in the Plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Bernhardt v. L.A. County*, 339 F.3d 920, 925 (9th Cir. 2003). A court does not have to accept as true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Critical to evaluating a constitutional claim is whether it has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989); *Franklin*, 745 F.2d at 1227.

The Federal Rules of Civil Procedure require only that the complaint include "a short and plain statement of the claim showing the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Nonetheless, a claim must be facially plausible to survive screening. This requires sufficient factual detail to allow the court to reasonably infer that each named defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678; *Moss*, 572 F.3d at 969. Although detailed factual allegations are not required, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678 (citations omitted), and courts "are not required to indulge unwarranted inferences," *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

If an otherwise deficient pleading could be cured by the allegation of other facts, the pro se litigant is entitled to an opportunity to amend their complaint before dismissal of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc); *Lucas v. Department of*

Corr., 66 F.3d 245, 248 (9th Cir. 1995). However, it is not the role of the Court to advise a pro se litigant on how to cure the defects. Such advice "would undermine district judges' role as impartial decisionmakers." *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *see also Lopez*, 203 F.3d at 1131 n.13.

SUMMARY OF OPERATIVE PLEADING

Plaintiff initiated this action by filing a pro se complaint in the Sacramento Division of this Court. (Doc. No. 1). The complaint identified 14 defendants, including 10 named employees of California State Prison ("CSP") Corcoran, two Does employed at CSP Corcoran, and two employees of CDCR Health Services in Sacramento. (Doc. No. 1 at 1-2). The then-assigned magistrate judge construed the complaint as raising claims of deliberate medical indifference and retaliation and found that it failed to state a cognizable claim against any defendant. (Doc. No. 9 at 4-6). Plaintiff was given the option to file an amended complaint. (*Id*. at 6-7).

On December 15, 2022, Plaintiff submitted his First Amended Complaint ("FAC") and the Sacramento Davison transferred the action to this Court on January 12, 2023. (Doc. Nos. 12, 15). In his FAC, Plaintiff narrows his claim to a single conditions of confinement action against four Defendants. The gravamen of the FAC is that the four identified correctional officers exhibited deliberate indifference to a substantial risk of harm to Plaintiff when they allowed an inmate with COVID symptoms to remain on Plaintiff's cell block. The facts giving rise to the complaint took place over an unspecified time frame in early 2021. (*Id.*).

On an unspecified date, another inmate, R. Simms, who was housed on Plaintiff's cell-block exhibited infectious symptoms including coughing and vomiting. (*Id*. at 3). Simms told Defendant White "that he think [sic] he got covid." (*Id.*). Simms' cell shared a vent with Plaintiff's cell and several others. (*Id.*). When he noticed Simms' symptoms, Plaintiff asked Defendants "can I move or [can you] move [Simms] per covid protocol[?]" (*Id.*). Defendant Hernandez responded, "no nigger you can die." (*Id.*). Defendant Barrios told Plaintiff, he "should die slowly." (*Id.*). Plaintiff has diabetes, which makes him "prone at getting covid," and when he relayed this to Defendants White and Gutierrez they replied, "so what [?] we know but we ain't going to do overtime to enforce policy." (*Id.*).

Around this time, Plaintiff requested a COVID test but was not immediately provided one. (*Id.*). On February 1, 2021, R. Simms tested positive for COVID-19, but refused to go to quarantine. (*Id.*). Plaintiff and others on his cell block "caught symptoms immediately." (*Id.*). Plaintiff suffered dizzy spells and vomited blood, but Defendants "disregarded" his symptoms until Plaintiff found "a non-regular nurse" who agreed to test him. (*Id.*). He ultimately tested positive for COVID-19. (*Id.*). Plaintiff states that his injuries include "pain, dizziness, and COVID-19." (*Id.*).

ANALYSIS AND APPLICABLE LAW

Eighth Amendment – Conditions of Confinement

"[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment," which prohibits "cruel and unusual punishment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993); U.S. Const. Amend. VIII. Whether an official violates the Eighth Amendment requires a showing of both an "objective component"—the objective seriousness of the challenged condition, and a "subjective component"—the responsible official's subjective state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Prison officials have an affirmative duty to protect prisoners from the risk of infectious diseases. *Helling*, 509 U.S. at 33 (collecting cases reproving the failure to separate prisoners with contagious diseases). To satisfy the subjective prong, the inmate must show that the prison official was deliberately indifferent—"possessed a sufficiently culpable state of mind." *Wilson*, 501 U.S. 297-98. This requires the official to be aware of the substantial risk of harm and disregard that risk by failing to abate it using reasonable measures. *Farmer*, 511 U.S. at 837-45. This level requires more than negligence but less than actual malice. *Id.* at 835-36.

Here, Simms exhibited symptoms of illness consistent with COVID-19 and told Defendants he thought he had COVID. (Doc. No. 12 at 3). His apparent illness, combined with his proximity to Plaintiff, who had a heightened risk of infection due to his diabetes, created a significant risk to Plaintiff's health that satisfies the objective prong of the Eighth Amendment analysis. See *Plata v. Newsom*, 445 F.Supp.3d 557, 559 (N.D. Cal. Apr. 17, 2020) ("[N]o one

questions that [COVID-19] poses a substantial risk of serious harm" to prisoners.); *see also Williams v. Dirkse*, No. 1:21-cv-00047-BAM (PC), 2021 WL 2227636, at *9 (E.D. Cal. June 2, 2021) ("The transmissibility of the COVID-19 virus in conjunction with [the prisoner plaintiff's] living conditions are sufficient to satisfy that 'conditions put the plaintiff at substantial risk of suffering serious harm.'"); accord *Sanford v. Eaton*, No. 1:20-CV-00792-BAM(PC), 2021 WL 3021447, at *7 (E.D. Cal. July 16, 2021); *Benitez v. Sierra Conservation, Center, et al.*, No. 1:21-cv-00370 BAM, 2021 WL 4077960, at *5 (E.D. Cal. Sept. 8, 2021) (transmissibility of the COVID-19 virus in conjunction with Plaintiff's living conditions, which he alleges were overcrowded and poorly ventilated, are sufficient to satisfy the objective prong).

Plaintiff made Defendants fully aware of the risk, including telling Defendants White and Gutierrez of his heightened risk as a diabetic, but in response, they did nothing. (Doc. No. 12 at 3). Two of the Defendants made callous or racist statements expressing their indifference to Plaintiff's wellbeing. (Doc. No. 12 at 3). Even after Plaintiff exhibited symptoms of illness, Defendants "disregarded" them, and Plaintiff was only able to get tested after a "non-regular nurse" agreed to help him. (*Id*.) In other words, Defendants knew of, and ignored a serious risk to Plaintiff's health and safety, satisfying the subjective prong. *Farmer*, 511 U.S. at 837. Plaintiff also satisfies the causation and harm requirements because he alleges that he suffered physical injury including pain, dizziness, and infection with COVID-19 as a proximate result of Defendants' inaction. While Plaintiff also alleges Defendants failed to follow COVID protocols, the failure to follow protocol alone is not necessarily sufficient to state a claim. *See Donaldson v. Kern County*, No. 1:14–cv–00257–AWI–JLT, 2015 WL 5321807 at *8 (E.D.Cal. Sept. 10, 2015). However, in conjunction with the other facts alleged, it may be further evidence of deliberate indifference.

Accepting the allegations of the FAC as true, Defendants knew about a serious threat to Plaintiff's health and safety and disregarded that risk "by failing to abate it using reasonable measures." *Farmer*, 511 U.S. at 837-45. Accordingly, the FAC states cognizable conditions of confinement claim under the Eighth Amendment against all four Defendants.

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Appointment of Counsel

Also pending before the Court is Plaintiff's motion to appoint counsel. (Doc. No. 14). The Court granted Plaintiff's application to proceed in this action *in forma pauperis*. (Doc. No. 9). Plaintiff seeks appointment of counsel because "having counsel will stop a stay of proceedings before they happen and further help me prosecute my case." (Doc. No. 14 at 1). He also refers to his long history of mental illness, implying that it may be an impediment to his ability to effectively represent himself. (*Id.*).

The United States Constitution does not require appointment of counsel in civil cases. *See Lewis v. Casey*, 518 U.S. 343, 354 (1996) (explaining that *Bounds v. Smith*, 430 U.S. 817 (1977), did not create a right to appointment of counsel in civil cases). Under 28 U.S.C. § 1915, this court has discretionary authority to appoint counsel for an indigent to commence, prosecute, or defend a civil action. *See* 28 U.S.C. § 1915(e)(1) (stating the court has authority to appoint counsel for people unable to afford counsel); *see also United States v. McQuade*, 519 F.2d 1180 (9th Cir. 1978) (addressing relevant standard of review for motions to appoint counsel in civil cases) (other citations omitted). However, motions to appoint counsel in civil cases are granted only in "exceptional circumstances." *Id.* at 1181. The court may consider many factors to determine if exceptional circumstances warrant appointment of counsel including, but not limited to, proof of indigence, the likelihood of success on the merits, and the ability of the plaintiff to articulate his or her claims pro se considering the complexity of the legal issues involved. *Id.*; *see also Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *withdrawn in part on other grounds on reh'g en banc*, 154 F.2d 952 (9th Cir. 1998).

Plaintiff has not met his "burden of demonstrating exceptional circumstances." *Jones v. Chen*, 2014 WL 12684497, at *1 (E.D. Cal. Jan. 14, 2014). While the assistance of counsel during trial may be helpful, the "relevant consideration is not one of convenience" but rather exceptionalness. *Howard v. Hedgpeth*, 2010 WL 1641087, at *2 (E.D. Cal. Apr. 20, 2010). Normal challenges faced by pro se litigants do not warrant appointment of counsel. *Siglar v. Hopkins*, 822 F. App'x 610, 612 (9th Cir. 2020) (denying appointment of counsel because the

plaintiff's "circumstances were not exceptionally different from the majority of the challenges faced by *pro se* litigants.") Plaintiff's concern about avoiding a stay of the proceedings is speculative and insufficient to establish exceptional circumstances.

Nor does Plaintiff's purported history of mental illness establish exceptional circumstances. Notably, Plaintiff does not provide any substantive evidence to establish a mental illness; however, even if Plaintiff did provide evidence of his mental illness, a review of the pleadings filed by Plaintiff to date show he can articulate his claims in this case. *See Brown v. Reif*, 2019 WL 989874, at *2 (E.D. Cal. Mar. 1, 2019) (denying appointment of counsel where the plaintiff's filing demonstrated the ability to properly litigate case despite mental illness).

Plaintiff has capably filed motions and his FAC has plausibly stated a claim to survive an initial screening. Plaintiff has not showed exceptional circumstances that warrant appointment of counsel at this early stage of the proceedings. Should this case progress and Plaintiff's circumstances change so that he is able to demonstrate exceptional circumstances, he may renew his motion for appointment at counsel at that time.

Accordingly, it is **ORDERED**:

1. The Court finds the FAC states a cognizable claim for deliberate medical indifference under the Eighth Amendment against Defendants Barrios, White, Gutierrez, and Hernandez.

2. The Court will direct service of process by separate order.

3. Plaintiff's Request for Appointment of Counsel (Doc. No. 14) is DENIED.

Dated: February 16, 2023

Helena M. Barch-Kuchta

HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE